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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-1409

UNITED STATES STEEL CORPORATION, et al.,
Petitioners,

vs.

UNITED MINE WORKERS OF AMERICA, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents, UNITED MINE WORKERS OF AMERICA, et al.,[1] oppose the Petition for Writ of Certiorari and herein present arguments in opposition.

[1] Respondents are individually designated in the caption of the Opinion of the Court of Appeals set forth at pp. 26-30 of Appendix B of the Petition.

COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. In an action wherein a preliminary injunction entered by a district court against a labor union is reversed and remanded to the district court for a hearing *de novo* within six days of the issuance of the injunction because of erroneous rulings by the district court and upon rehearing, the Plaintiffs do not proceed but stipulate to an indefinite continuance because no picketing, strike or work stoppage then existed and none was anticipated in the immediate future, is not the labor union entitled to recover its losses, expenses and damages, including attorney's fees incurred in defending against the injunction pursuant to Section 7 of the Norris-LaGuardia Act?

COUNTER STATEMENT OF CASE

The statement of the case presented by Petitioners is accepted with the following exceptions and additions:

The $1,000.00 bonds executed by each of the Petitioners held the Plaintiffs liable to the Defendants "for such costs and damages, not exceeding the sum of $1,000.00, as Defendants or any other person may sustain by reason of the Preliminary Injunction, if the Court finally decides that Plaintiff is not entitled thereto." (Petition, Appendix B, p. 32). Neither the bond nor the Order of Court approving it indicates that it is filed pursuant to Rule 65(c) of the Federal Rules of Civil Procedure. Indeed the Court of Appeals noted that "[n]either the orders granting the preliminary injunction nor the bond in any case made reference to the authority under which the Court required that the bond be posted." (Petition, Appendix B, p. 32).

While it is factually accurate that no complaint was made by the Respondents to the District Court as to the condition or the amount of the bond, it should be noted that only six days passed between the entrance of the preliminary injunction by the District Court and its reversal by the Court of Appeals for the Third Circuit. Furthermore, as the Court of Appeals noted in its opinion, "[t]he record discloses no opportunity for the Defendants to examine the bond prior to its approval and filing." (Petition, Appendix B, p. 32).

The Opinion of the Court of Appeals summarily reversing the preliminary injunction issued by the District Court did not reach the merits of whether Petitioners were in fact entitled to a preliminary injunction. It did rule, however, that the preliminary injunction issued on June 24, and amended on June 25, was improper and based on erroneous rulings and reversed it. The Court's Opinion further raised, but did not decide, several serious questions as to whether injunctive relief could be granted on the facts in that case. Following remand, Petitioners requested a hearing *de novo* on its application for a preliminary injunction but instead of proceeding, entered into a stipulation that no work stoppage or strike existed and in effect recognized that injunctive relief was no longer required.

ARGUMENTS AND REASONS WHY THE WRIT SHOULD BE REFUSED

1. Petitioners argue on the basis of this Courts decision in *Boys Markets vs. Retail Clerks Union, Local 770,* 398 U.S. 235 (1970), that if a district court, on the basis of the principles adopted in *Boys Markets,* determines that the case is one in which an injunction would be appropriate despite Norris-LaGuardia, that Act is wholly inapplicable to the case. (Petition p. 11). In support of this proposition, Petitioners argue that only eight states having "little Norris-LaGuardia Acts" have bond provisions expressly requiring the payment of attorneys' fees as in Section 7, and that the right to recoup attorneys' fees in the district court will lead to the use of removal proceedings under 28 U.S.C. §1441, and forum shopping, thus frustrating the relative uniformity in the enforcement of arbitration agreements sought by this Court. In so arguing, Petitioners ignore both the express language of this Court and its stated rationale.

In the *Boys Markets* Opinion, this Court expressly noted that its holding is a narrow one, and that it does not undermine the vitality of the Norris-LaGuardia Act. 398 U.S. at 253. Nowhere in the Opinion does this Court indicate that the passage of Section 301 of the Labor-Management Relations Act was meant to abrogate the Norris-LaGuardia Act as a whole in cases wherein a District Court determines that an injunction is appropriate despite Section 4 of the Norris-LaGuardia Act. On the contrary,

the Opinion speaks in terms of *accommodating the literal terms* of Section 4 of the Norris-LaGuardia Act to the subsequently enacted provisions of Section 301(a) of the Labor-Management Relations Act and the purposes of arbitration. 398 U.S. at 250. *Accord, New York Tel. Co. vs. Communications Workers*, 445 F.2d 39 (2d Cir. 1971).

Petitioners' argument regarding anticipated forum shopping and the use of removal proceedings, thus frustrating the relative uniformity in the enforcement of arbitration agreements sought by this Court is not persuasive. In the first instance, the argument assumes that the Federal policy of labor law uniformity requires absolute uniformity in all particulars as between the Federal and State Courts. This is not the case. In the *Boys Markets* decision, this Court, perhaps anticipating such an argument, noted that:

> This policy, [of labor law uniformity] of course, could hardly require, as a practical matter, that labor law be administered identically in all courts, for undoubtedly a certain diversity exists among the state and federal systems in matters of procedural and remedial detail, a fact that Congress evidently took into account in deciding not to disturb the traditional jurisdiction of the States.
>
> 398 U.S. at 246

More importantly, the availability or non-availability of counsel fees as an element of damages for an erroneous or improvident injunction will in no way frustrate the uniformity in the enforcement of arbitration agreements which was the primary goal this Court sought to achieve in the *Boys Markets* case. Both State and Federal Courts may now enjoin work stoppages over arbitrable disputes. As the Court of Appeals noted in its Opinion,

> In most cases the contract will be so clear one way or the other and the likelihood of damage to the union from a preliminary injunction requiring resort to contract arbitration so slight that the imposition of a §7 undertaking for loss, expense or damage caused by improvident or erroneous issuance, will impose no significant burden.
>
> (Petition, Appendix B, p. 39)

The Court further noted that there would be no conflict as between State Courts and Federal Courts

> . . . in cases in which a preliminary injunction should properly have issued under §301, since attorneys' fees in those cases will not be awarded. As to cases where a preliminary injunction should not have issued, the recognition in *Boys Markets* that the Norris-LaGuardia Act is still in force, may in many states result in different law being applied depending on the state or federal forum. But that is what Congress intended when Norris-LaGuardia was passed and, as the Supreme Court makes clear in *Boys Markets*, §301 of the Labor Management Relations Act, suggests an accommodation, not a repeal.
>
> (Petition, Appendix B, p. 40)

Thus, the limited number of cases in which attorneys' fees are likely to be awarded under Section 7 of the Act, makes it unlikely that there would be the type of rampant forum shopping and maneuvering that this Court perceived as a result of the availability or non-availability of an injunction. Furthermore, the availability of counsel fees in the event of the erroneous issuance of injunctive relief will in no way affect the relative uniformity of enforcement of arbitration agreements which this Court sought to achieve in the *Boys Markets* decision.

2. Petitioners argue that there can be no recovery for damages as a result of the erroneous granting of a preliminary injunction until there has been a final decision on the merits as to Petitioners' right to injunctive relief. Following the reversal of the District Court's Order granting a preliminary injunction and remand of the case by the Court of Appeals, Petitioners requested a hearing *de novo*. At that hearing, Petitioners stipulated that to their knowledge no picketing, work stoppage or strike existed and none was known to be anticipated in the immediate future. (Petition, Appendix B, pp. 32-33). No further hearings on this matter have been held. (Appendix filed by Respondents in the Court of Appeals, pp. 1a-35a). The Court of Appeals correctly concluded that the effect of the stipulation was to end the law suit for all practical purposes. (Petition, Appendix B, p. 33). While further pleadings have been filed, they were required to be

filed for disposition of the question of damages and not because of the question of injunctive relief. Indeed, in *Madison Shipping Corp. vs. National Maritime Union*, 204 F. Supp. 22(E.D. Pa. 1962) relied on by Petitioners, the Court allowed the assessment of costs and damages following dismissal of the portion of the complaint seeking injunctive relief before a final determination of the question of damages.

3. Petitioners argue that this case raises a significant issue as to the type of bond to be given in a Section 301 action, i.e., whether such a bond must comply with Rule 65 of the Federal Rules of Civil Procedure, or Section 7 of the Norris-LaGuardia Act. It is suggested that the issue is fallacious. Rule 65 and Section 7 exist and operate independently of one another. Indeed, Rule 65(e) specifically provides that "[t]hese rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee;" Federal Rules of Civil Procedure, 28 U.S.C.A. Rule 65(e). Rule 65 and Section 7 are not mutually exclusive. Rule 65 requires the posting of security as a prerequisite for the issuance of a restraining order or preliminary injunction. Section 7 contains provisions in some ways identical, and in other ways more protective of the party restrained. The question raised by a decision of the District Court to issue preliminary injunctive relief is not which of the two provisions to apply, but rather whether both should be applied. The latter course is the correct one where the case involves a labor dispute. This case clearly involved a labor dispute within the definition of that term set out by the Norris-LaGuardia Act. That Act was therefore clearly applicable to this case and to all cases involving labor disputes in which the District Court grants injunctive relief.

4. Petitioners argue that the decision of the Court of Appeals is in conflict with the decision of the Eighth Circuit in *International Ladies Garment Workers' Union vs. Donnelly Garment Co.*, 147 F.2d 246 (8th Cir. 1945) cert. denied, 325 U.S. 852 (1945). The opinion of the Court of Appeals carefully elaborates the Court's reasons for not following *Donnelly*. Petitioners' criticism of the Court's scholarly and detailed reasoning lacks merit. Thus, the Court's basis for distinguishing *Lawrence vs. St.*

Louis-S. Fran. R. Co., 278 U.S. 228 (1929) is not that it was a State court action, but that in all likelihood it referred to old equity practice. More importantly, the Court noted that the language in the *Lawrence* case limiting a recovery to the amount of the bond was dicta. Indeed, the *Lawrence* Court cites *Russel vs. Farley*, 105 U.S. 433 (1881) as authority, and the Court of Appeals notes that the language in *Russell vs. Farley* limiting recovery to cases where a bond is posted is similarly dicta.

Petitioners criticize the opinion of the Court of Appeals for noting that the *Donnelly* approach would rule out any liability for wrongfully obtaining an injunction in any case where the Court did not require the posting of a bond. Petitioners argue that this assertion is wholly unfounded because it overlooks the requirement of Rule 65(c) that no injunction is effective until a bond is posted. Petitioners' criticism overlooks the fact that in the case at bar, as in most cases, the injunctive relief is granted in open court after a hearing, and the bond required to make the injunction effective is not filed until later in the day, or perhaps the following day. While the injunction may not technically be effective until the bond is filed, practically, it is in effect from the time of the Court's pronouncement. More importantly, however, there is no significant difference between the complete absence of the bond and the approval of a bond in an amount insufficient to cover substantially higher damages.

Thus, as carefully outlined by the Court of Appeals, its opinion does not conflict with the decision of the Eighth Circuit in *Donnelly*.

5. Petitioners criticize the Court of Appeal's reading of Section 7 of the Norris-LaGuardia Act. Again, however, the Court of Appeals has carefully elaborated its reasons for concluding that the liability of a Plaintiff, though not of a surety, for loss, expense or damage, including attorneys' fees, under Section 7 of the Norris-LaGuardia Act should be fixed by the Court without regard to any limitation in an injunction bond. One of the reasons, which the Court itself characterized as perhaps the most compelling, is the remedial purpose intended by Congress in passing this Act.

> The enactment of the Norris-LaGuardia Act reflected a judgment that at least in the period prior to 1932 the judges of federal district courts were entirely too willing to accede to requests by employers for injunctions against labor unions. *See Boys Markets, Inc. vs. Local 770, Clerks Union*, 398 U.S. at 250-51; F. Frankfurter & N. Greene, The Labor Injunction (1930). It is hardly logical to read §7 so that the extent of the new liability for loss, expense, or damage which it created would depend entirely on the unbridled discretion of these same district court judges against whom the whole statute was directed. Yet that is the very result of the *Donnelly* decision. The atmosphere of the federal courts in labor cases may well have changed since 1932, but Congress has not seen fit to amend §7.
>
> (Petition, Appendix B, p. 50)

Clearly, there is nothing sacred involved in a District Court fixing the amount of a Section 7 bond. As Petitioners have pointed out. (Petition, p. 15), such a bond may be increased or reduced at the discretion of the Court. 7 Moore's Federal Practice, §65.09, p. 1657 (Second Edition, 1971). The purpose of the bond is to provide security to parties erroneously enjoined for the recovery of their damages, including attorneys' fees incurred in defending against the action. The purpose of the bond is not to limit the liability of a Plaintiff in a case such as the one at bar where the period of time between the issuance of the injunction and its reversal by the Court of Appeals was only six (6) days, thereby effectively precluding the opportunity to petition the District Court for an increase in the bond.

CONCLUSION

For all of the reasons set forth above, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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